Supreme Court, U.S.
FILED
99 618 OCT 8 1999
OFFICE OF THE CLERK

No. 99-

IN THE

Supreme Court of the United States

PLANNED PARENTHOOD OF KANSAS AND MID-MISSOURI, INC.,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STEVEN E. OBUS
Counsel of Record
Proskauer Rose LLP
1585 Broadway
New York, New York 10036
(212) 969-3000

ROGER K. EVANS
Planned Parenthood Legal Defense
Planned Parenthood Federation
of America, Inc.
810 Seventh Avenue
New York, New York 10019
(212) 541-7800

6519

QUESTION PRESENTED

Does a plaintiff who obtains substantially all of the relief sought by its action qualify as a "prevailing party" under 42 U.S.C. § 1988, notwithstanding the ultimate dismissal of its complaint, where the court, in order to avoid holding a state statute unconstitutional, (1) rejects the construction of the statute under which the State deemed the plaintiff to be ineligible for public funding, and (2) adopts an alternative construction under which the plaintiff was deemed to qualify for such funding?

STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceeding. Throughout the litigation, the petitioner was known as Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. That name changed to petitioner's current name, Planned Parenthood of Kansas and Mid-Missouri, Inc., subsequent to the entry of the orders of which review is sought. Petitioner has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

Question Presented i

Statement Pursuant to Rule 29.6 ii

Table of Contents iii

Table of Cited Authorities v

Table of Appendices vii

Opinions Below 1

Jurisdiction 1

Statutes Involved 1

Statement of the Case 3

A. Procedural History 3
B. The Supplemental Complaint 6
C. The District Court's Decision 7
D. The Court of Appeals' Decisions 7

Reasons For Granting the Writ 10

I. The Decision Below Conflicts with Prevailing Party Doctrine Established by this Court. 11

II. The Decision Below Applies the *Ashwander* Principles in a Manner that Undermines the Important Congressional Policy Underlying the Civil Rights Attorneys Fees Act. 17

Conclusion 19

TABLE OF CITED AUTHORITIES

Page

Cases:

Ashwander v. Tennessee Valley Auth.,
297 U.S. 288 (1936) 11, 14, 15, 17, 18

Bray v. Alexandria Women's Health Clinic,
506 U.S 263 (1993) 13

Crowell v. Benson, 285 U.S. 22 (1932) 15

Farrar v. Hobby, 506 U.S. 103 (1992) 16

Hagans v. Levine, 415 U.S. 528 (1974) 12

Hensley v. Eckerhart, 461 U.S. 424 (1983) 12, 17

Hewitt v. Helms, 482 U.S. 755 (1987) 11, 16

Hooper v. California, 155 U.S. 648 (1895) 15

Maher v. Gagne, 448 U.S. 122 (1980) 10, 12, 13, 14

Mateyko v. Felix, 924 F.2d 824 (9th Cir.),
cert. denied, 502 U.S. 814 (1991) 14

Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980),
cert. denied, 449 U.S. 1102 (1981) 12

Northcross v. Board of Educ., 611 F.2d 624
(6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980) 12

Cited Authorities

Page

Taylor v. Sterrett, 640 F.2d 663 (5th Cir. 1981) 12

Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782 (1989) 10, 11

United States v. Delaware & Hudson Co., 213 U.S. 366 (1909) 15

Statutes and Other Authorities:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1988 ..... 1, 9, 11, 12, 14

H. R. Rep. No. 94-1558 (1976) 12, 14, 17

Missouri House Bill No. 10, § 10.680, 88th Leg., 1st Sess. (Mo. 1995) 3

Missouri House Bill No. 1010, § 10.640, 88th Leg., 2d Sess. (Mo. 1996) 4

Missouri House Bill No. 20, § 20.685, 89th Leg., 1st Sess. (Mo. 1997) 4

Missouri House Bill 1010, § 10.715, 89th Leg., 2d Sess. (Mo. 1998). 2, 5, 6, 7, 8

Mo. Const. art. III, § 26 6

S. Rep. No. 94-1011, 94th Cong. 2d Sess., 1976 U.S. Code Cong. & Admin. News 11

TABLE OF APPENDICES

	Page
Appendix A — Order Of The United States Court Of Appeals For The Eighth Circuit Dated May 25, 1999	1a
Appendix B — Order Of The United States Court Of Appeals For The Eighth Circuit Dated March 25, 1999	3a
Appendix C — Opinion Of The United States Court Of Appeals For The Eighth Circuit Dated And Filed February 3, 1999	5a
Appendix D — Order Of The United States District Court For The Western District Of Missouri, Central Division Dated And Filed July 17, 1998	20a
Appendix E — Order Of The United States District Court For The Western District Of Missouri, Central Division Dated And Filed June 30, 1997	26a
Appendix F — Amended Order Of The United States District Court For The Western District Of Missouri, Central Division Dated And Filed June 27, 1996	28a
Appendix G — Order Of The United States Court Of Appeals For The Eighth Circuit Denying Petition For Rehearing Dated May 11, 1999	40a
Appendix H — Missouri House Bill No. 1010, § 10.715 89th General Assembly	42a
Appendix I — Excerpts From Appellant State Of Missouri's Motion For Clarification	45a

Appendix J — Supplement To Plaintiff-Appellee's Petition For Rehearing And Rehearing *En Banc* On The Issue Of "Prevailing Party," Dated April 21, 1999 and Filed April 22, 1999 ..... 48a

Appendix K — Missouri House Bill No. 10, § 10.680 88th General Assembly 52a

Appendix L — Missouri House Bill No. 1010, § 10.640 88th General Assembly 53a

Appendix M — Missouri House Bill No. 20, § 20.685 89th General Assembly 54a

Planned Parenthood of Kansas and Mid-Missouri, Inc. ("Planned Parenthood"), petitions for a writ of certiorari to review two orders of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The two orders of which review is sought, dated March 25, 1999 and May 25, 1999, are unreported. The first order, dated May 25, 1999, is reprinted in the appendix below ("Pet. App.") at 1a-2a. The second order, dated March 25, 1999, is reprinted at Pet. App. 3a-4a. The Order of the Eighth Circuit, dated May 11, 1999, denying Planned Parenthood's petition for rehearing with suggestion for rehearing en banc, also unreported, is reprinted at Pet. App. 40a-41a. By letter dated August 2, 1999, Planned Parenthood's application (No. A-87) to this Court for an extension of time within which to file this petition to and including October 8, 1999 was granted. The underlying opinion of the United States Court of Appeals for the Eighth Circuit is reported at 167 F.3d 458 (8th Cir. 1998), and is reprinted at Pet. App. 5a. The decision of the United States District Court for the Western District of Missouri, dated July 17, 1998, is unreported, and is reprinted at Pet. App. 20a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1988(b) provides, in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public

> Law 92-318, the Religious Freedom Restoration Act of 1993, title VI of the Civil Rights Act of 1964, or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .

Missouri House Bill 1010, § 10.715(1), 89th Leg., 2d Sess. (Mo. 1998), provides that funds appropriated thereunder by the legislature of the State of Missouri may be used:

> for the purpose of funding family planning services, pregnancy testing and follow-up services, provided that none of these funds may be expended for the purpose of performing, assisting or encouraging for abortion, and further provided that none of these funds may be expended to directly or indirectly subsidize abortion services or administrative expenses, as verified by independent audit. None of these funds may be paid or granted to organizations or affiliates of organizations which provide or promote abortions. . . .

STATEMENT OF THE CASE

A. Procedural History

This case had its genesis in 1995, when the Legislature of the State of Missouri enacted House Bill ("H.B.") 10, which appropriated funds to the Missouri Department of Health (the "Department") for family planning services for the 1996 fiscal year. As was found below by the United States District Court for the Western District of Missouri, in a decision from which no appeal was taken, the legislature defined the organizations eligible for contracts under H.B. 10 in a way that "gerrymandered" Planned Parenthood out of eligibility for the program. Pet. App. 28a, 34a-35a. The district court further found that Missouri had sought to exclude Planned Parenthood solely because Planned Parenthood — using private funds, not State family planning funds — provided abortions and engaged in advocacy to protect access to abortion. Pet. App. 38a.[1]

On May 16, 1996, Planned Parenthood brought this action against the Director of the Department, challenging H.B. 10 on the grounds that Planned Parenthood's exclusion from the family planning program violated Planned Parenthood's rights under the Equal Protection Clause, constituted an impermissible penalty on Planned Parenthood's exercise of constitutional rights, and was a bill of attainder. Planned Parenthood sought, and the district court granted on June 27, 1996, (1) a declaration that Planned Parenthood's exclusion by the Department from eligibility for state-appropriated family planning funds was unconstitutional; and (2) a permanent injunction prohibiting the Department from excluding Planned Parenthood from eligibility for state-appropriated family planning funds under H.B. 10 because

---

1. Relevant portions of the text of H.B. 10, § 10.680, are set forth at Pet. App. 52a.

Planned Parenthood, "with its private funds provides abortions and engages in public advocacy to protect safe and legal abortion services." Pet. App. 38a-39a (the "1996 Order"). No appeal was taken from the 1996 Order.

Prior to its adjournment on May 17, 1996, the Missouri Legislature enacted H.B. 1010 (1996) for the 1997 fiscal year, which contained substantially the same provisions as did H.B. 10. (Pet. App. 53a.) Accordingly, the Department implemented H.B. 1010 consistent with the district court's 1996 Order, and made family planning funds appropriated under that provision available to Planned Parenthood.

One year later, the Legislature enacted a family planning appropriation bill for the 1998 fiscal year that differed in some respects from the bills for prior years, but had in common with the earlier bills an intent to exclude Planned Parenthood from receiving state family planning funds. H.B. 20 § 20.685 (1997) established a three-tiered alternative system for appropriating funds to the Department for family planning services. The statute provided that, if the first tier were determined to be unconstitutional, then the second tier would come into play and so forth until one of the tiers was approved as constitutional. Under Tier 1, no state family planning funding could go to "organizations or affiliates of organizations which provide or promote abortions" — a category which the Department understood to include Planned Parenthood. Similarly, Planned Parenthood would not have been deemed eligible under Tier 2, which contained the same funding restrictions as appeared in the two prior appropriations,

H.B. 10 and H.B. 1010, nor under Tier 3, which would have allocated funds only to public or quasi-public agencies.[2]

On June 27, 1997, the day after the Governor of Missouri signed H.B. 20 into law, the Attorney General, on behalf of the Department, moved in the district court for clarification whether the implementation of H.B. 20 would violate the 1996 Order. Planned Parenthood, which was preparing to commence a new lawsuit to challenge H.B. 20, argued in response to the Department's motion to clarify that, like its predecessors, H.B. 20 was unconstitutional, and that its enforcement would violate the 1996 Order. The district court agreed and, by order dated June 30, 1997, ruled that implementation of any of the restrictions following the first sentence of section 20.685.1 of H.B. 20 would violate the 1996 Order. Pet. App. 26a-27a. Accordingly, the Department continued to be enjoined from excluding Planned Parenthood from program eligibility. Again, no appeal was taken from the district court's ruling.

Finally, on June 19, 1998, the Governor of Missouri signed into law the family planning appropriation for the 1999 fiscal year — H.B. 1010, § 10.715 (1998) — which is the statute that underlies the instant petition.[3] Section 10.715 of H.B. 1010, like section 20.685 of H.B. 20 before it, embodied a three-tiered appropriation scheme. In language nearly identical to that of H.B. 20, § 20.685, the first tier of section 10.715 provided that the appropriated funds were to be used:

---

2. Relevant portions of the text of H.B. 20, § 20.685, are set forth at Pet. App. 54a-57a.

3. Relevant portions of the text of H.B. 1010, § 10.715, are set forth at Pet. App. 42a-44a.

> for the purpose of funding family planning services, pregnancy testing and follow-up services, provided that none of these funds may be expended for the purpose of performing, assisting or encouraging for abortion, and further provided that *none of these funds may be expended to directly or indirectly subsidize abortion services or administrative expenses, as verified by independent audit. None of these funds may be paid or granted to organizations or affiliates of organizations which provide or promote abortions . . . .*

H.B. 1010, § 10.715(1), 89th Leg., 2nd Sess. (Mo. 1998) (emphasis added).

B. The Supplemental Complaint

On June 19, 1998, Planned Parenthood filed a supplemental complaint challenging the constitutionality of Missouri's 1999 appropriation, on the ground that the State of Missouri was, once again, seeking improperly to exclude Planned Parenthood from eligibility for participation in the state-funded family planning program. Planned Parenthood sought a supplemented or amended judgment declaring § 10.715 unconstitutional and enjoining application of the statute to exclude Planned Parenthood from the family planning program.[4]

---

4. Though the State of Missouri maintains no official legislative history, MO. CONST. art. III, § 26, Planned Parenthood compiled statements by members of the Missouri Legislature contemporaneous with the enactment of section 10.715 that manifested the plain objective of the Legislature to exclude Planned

(continued...)

C. The District Court's Decision

After considering submissions by the Attorney General and by counsel for intervenor State of Missouri,[5] the district court, by order dated July 17, 1998, held that implementation of the eligibility restrictions following the first sentence of section 10.715 would violate the Constitution and the 1996 Order. Accordingly, the court once again prohibited the State of Missouri from "excluding [Planned Parenthood] from the [family planning] Program because [Planned Parenthood] with its private funds provides abortions and engages in public advocacy to protect safe and legal abortion services." Pet. App. 20a, 25a.

D. The Court of Appeals' Decisions

On appeal, the Court of Appeals for the Eighth Circuit rejected the contention by the intervenor-appellant State of Missouri that section 10.715 comported with constitutional requirements as it had been interpreted by the State — to prohibit "grantees from having any affiliation with abortion service providers." Pet. App. 13a-14a. Rather than hold section 10.715 unconstitutional, however, the Eighth Circuit elected, consistent with cardinal principles of constitutional jurisprudence, to preserve the constitutionality of the statute by construing it to permit organizations that were affiliated with

---

4. (...continued)
Parenthood from funding under the statute. *E.g.*, Statement of Rep. Reynolds ("I am happy with the latest version because Planned Parenthood is out.").

5. The Missouri Legislature, dissatisfied with the manner in which the Attorney General had represented the Department in this case, caused the appointment of a Special Assistant Attorney General ostensibly to represent the "State of Missouri" as intervenor.

abortion providers to receive public funds, so long as such organizations did not subsidize the affiliated abortion providers. On that basis, the Court upheld the constitutionality of the statute:

> In addition, Tier I would cross the line established in *Rust* [500 U.S. 173 (1991)], *League of Women Voters* [468 U.S. 364 (1984)], and *Regan* [461 U.S. 540 (1983)], and hence be an unconstitutional condition, if we interpreted it to prohibit grantees from having any affiliation with abortion service providers. We interpret statutes to avoid serious constitutional problems, so long as the statutory language is fairly susceptible to a constitutional construction. Accordingly, we construe the language of Tier I to allow a grantee to maintain an affiliation with an abortion service provider, so long as that affiliation does not include direct referrals for abortion.

Pet. App. 13a-14a. Because section 10.715, as the Eighth Circuit ultimately construed it, passed constitutional muster, the court of appeals vacated the preliminary and permanent injunctions entered by the district court and remanded the case with directions that the complaint be dismissed. Pet. App. 19a.

Following the Eighth Circuit's opinion, the State of Missouri moved for clarification, requesting that the Eighth Circuit issue a separate order, mandate or instruction, or that it amend its opinion, to hold that "Planned Parenthood does not qualify for funds under § 10.715, and that it must return to the State the family planning funds that it wrongfully received for fiscal year 1999." Pet. App. 45a-46a. The court of appeals

denied the State's motion by order dated March 25, 1999. Pet. App. 3a-4a.

Following the denial of the State's motion for clarification, the Department deemed Planned Parenthood eligible for continued funding under section 10.715 throughout the remainder of the fiscal year, based on the standards announced in the Eighth Circuit's opinion. Pet. App. 48a-51a. *See* 167 F.3d at 464 (noting that Planned Parenthood could qualify for funding by establishing "an independent affiliate to provide abortion services outside the government program"). Planned Parenthood was also permitted by the Department to retain the family planning funds that it received during the pendency of the injunction issued by the district court. *See* Pet. App. 4a, 46a. Thus, Planned Parenthood obtained all of the relief that it sought by this action.

Nonetheless, in its March 25, 1999 order, the panel granted the State's motion for costs as the "prevailing party" in this case. Planned Parenthood sought a rehearing and rehearing en banc, arguing that it, not the State, was the prevailing party under 42 U.S.C. § 1988. The court of appeals denied Planned Parenthood's petition on May 11, 1999, with one judge voting for rehearing by the panel, and one other judge voting for rehearing en banc. Pet. App. 40a-41a. Thereafter, Planned Parenthood's motion for attorney fees and expenses was denied as moot. Pet. App. 1a-2a.

REASONS FOR GRANTING THE WRIT

By this action, Planned Parenthood sought to gain access to State family planning funds to which Missouri's Department of Health had determined it was not eligible because, using its own funds, Planned Parenthood had advocated for abortion rights and subsidized abortion services. As a result of this action, Planned Parenthood fully accomplished the result that it set out to achieve.

Rather than accept Planned Parenthood's invitation to strike down as unconstitutional Missouri's appropriations statute, however, the court of appeals chose to enable Planned Parenthood to participate in the family planning program by adopting a construction of the statute that had not previously been applied by the Department, expressly to avoid the constitutional infirmity to which a more natural reading of the statute — the one given it by the Department for two consecutive years *and* by the district court — would have given rise. The court below nonetheless did not deem Planned Parenthood to be the prevailing party, even though it had succeeded in substantially "chang[ing] the legal relationship between itself and the defendant." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989). The court apparently so ruled because the formal disposition of the State's notably unsuccessful appeal was an order of remand with instructions to dismiss.

This case thus offers the Court an opportunity to clarify its own teaching, and also to carry out Congress' plain intention to encourage the bringing of substantial civil rights claims, by assuring that a litigant will be deemed to be a prevailing party, even when it has not formally obtained a favorable constitutional adjudication, if it has substantially "vindicate[d] rights through a consent judgment or *without formally*

obtaining relief." *Maher v. Gagne*, 448 U.S. 122, 129 (1980) (quoting S. Rep. No. 94-1011, p.5, 94th Cong. 2d Sess., 1976 U.S. Code Cong. & Admin. News p. 5908, 5912) (emphasis added). In addition to affording the Court an opportunity to correct a manifest injustice in this case, certiorari should be granted because, absent corrective action by the Court, deserving parties that have incurred substantial expense in the course of obtaining actual relief, will continue to be denied the reimbursement that Congress clearly intended that they receive, whenever a court, in accordance with the mandate of *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288 (1936), preserves the validity of a defective statute by construing it in such a manner as to avoid a finding of constitutional infirmity.

I.

THE DECISION BELOW CONFLICTS WITH PREVAILING PARTY DOCTRINE ESTABLISHED BY THIS COURT.

In *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. at 792-93, this Court instructed that "[t]he touchstone of the prevailing party inquiry [under 42 U.S.C. § 1988] must be the *material alteration of the legal relationship of the parties* in a manner which Congress sought to promote in the fee statute." (Emphasis added). As the Court further explained in *Hewitt v. Helms*, 482 U.S. 755, 760 (1987), ". . . relief need not be judicially decreed in order to justify a fee award under § 1988." Consent decrees and settlements are only "examples" of dispositions, other than litigated judgments, that can provide the predicate for prevailing party status. Even when there has been no adjudication at all, if "[a] lawsuit sometimes produces a voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment — e.g. . . . a

change in conduct that redresses the plaintiff's grievances," the plaintiff is to be considered the prevailing party. *Id.* at 760-61.

"'[T]he proper focus is whether the plaintiff has been successful on the central issue *as exhibited by the fact that he has acquired the primary relief sought.*'" *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (quoting with approval *Taylor v. Sterrett*, 640 F.2d 663, 669 (5th Cir. 1981) (emphasis added). *See also Morrison v. Ayoob*, 627 F.2d 669, 671 (3d Cir. 1980) ("[T]he plaintiffs received precisely the relief they wanted. *Moreover, the fact that the action was dismissed makes no difference.* Under § 1988 the focus is on the relief received rather than any formal procedural labels." (emphasis added)), *cert. denied*, 449 U.S. 1102 (1981); *Northcross v. Board of Educ.*, 611 F.2d 624, 633 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980) (same); *see also* H. R. Rep. No. 94-1558 p.7 (1976) (where a plaintiff has obtained the relief it sought, "[a] court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed").

Consistent with these principles, in *Maher v. Gagne*, 448 U.S. 122, the Court recognized that a plaintiff in an action under 42 U.S.C. § 1983, who achieves success through the application of state law, may be a prevailing party even where the court never reaches the plaintiff's federal constitutional claim. Quoting the House Report that accompanied H.R. 15460, a bill substantially identical to the Senate bill that became § 1988, the Court noted that, "'[i]n some instances . . . the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive.'" 448 U.S. at 133 n.15 (quoting H.R. Rep. No. 94-1558 p.4 n.7 (1976) (recognizing that, under *Hagans v. Levine*, 415 U.S. 528 (1974), courts should avoid the adjudication of constitutional questions where a disposition is

available under state law, yet confirming that, in such cases, fees may be awarded under § 1988)). Under such circumstances, the Court held, the plaintiff will still be deemed to have prevailed for purposes of § 1988 so long as the plaintiff has obtained at least some portion of the relief it sought. As the Court explained, "such a fee award 'furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues.'" *Id.* at 133 (quoting with approval, *Maher v. Gagne*, 594 F.2d 336, 342 (2d Cir. 1979)).

The orders entered below are at odds with these principles. In declaring the State to be the prevailing party, the court of appeals ignored the obvious, concrete financial benefit that Planned Parenthood achieved by this litigation. As a result of this litigation, Planned Parenthood achieved uninterrupted and continuing eligibility for funds under the State's family planning program, so long as it committed, as it had always insisted it would, to provide abortions only through an affiliate that is physically and financially separate from the program supported by the State's funds. The court's decision to interpret the challenged statute in a manner that both preserved its constitutionality and directly benefitted Planned Parenthood thus rendered Planned Parenthood the prevailing party, just as a judgment, settlement, or voluntary action by the defendant would have. Indeed, given that a plaintiff will be deemed to have prevailed when the defendant affords relief voluntarily, it is ironic that the State would contend that Planned Parenthood did not prevail when it achieved its objective here over the State's strenuous opposition.

This is not a case, moreover, in which it may fairly be said that, although the plaintiff prevailed on the basis of state law, the plaintiff's federal constitutional claim was rejected. *Compare Bray v. Alexandria Women's Health Clinic*, 506 U.S.

263, 285 (1993). Planned Parenthood was deemed eligible for state funding in this case only *because* the court found that Planned Parenthood's federal constitutional position was sound. The court therefore rejected the Department's construction of the statute, adopting instead a construction of state law under which Planned Parenthood qualified for funding.

As the Court explained in *Maher v. Gagne*, Congress intended that a plaintiff who has had success under state law be deemed to be the prevailing party for purposes of § 1988, even when the court, for jurisprudential reasons, avoids a constitutional adjudication. 448 U.S. at 133. As the Ninth Circuit recognized in *Mateyko v. Felix*, 924 F.2d 824, 828-29 (9th Cir.), *cert. denied*, 502 U.S. 814 (1991), "[i]n such a case the denial of fees would be unfair and would frustrate section 1988's purpose to encourage private parties to vindicate their federal civil rights." That is precisely what has happened here.

In his seminal concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), Justice Brandeis catalogued the rules that the Court has developed "under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Id.* at 346. Among those rules was the rule that, "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Id.* at 347. That is the example cited in *Maher*, and in H.R. Rep. No. 94-1558, of a situation where a plaintiff who had not obtained a favorable constitutional adjudication would nonetheless be deemed to have prevailed for purposes of § 1988.

Another of the jurisprudential rules enumerated by Justice Brandeis was that, when the validity of a statute is drawn into question (as it was here), "even if a serious doubt of

constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." 297 U.S. at 348, *quoting Crowell v. Benson*, 285 U.S. 22, 62 (1932). *See also Hooper v. California*, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."). This is another example of a situation in which Congress intended that a party who has not formally obtained a favorable constitutional adjudication should nonetheless be deemed to have prevailed.

Recognizing that the Missouri statute at issue here posed serious constitutional problems as interpreted by the Department, the court below chose a different construction, and thereby upheld the statute. In *United States v. Delaware & Hudson Co.*, a case cited by Justice Brandeis in *Ashwander*, this Court expressly recognized that, under such circumstances, a court should not reach out to declare the problematic construction to be unconstitutional, but rather should "adopt that construction which will save the statute from constitutional infirmity:

> And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.

213 U.S. 366, 407-08 (1909) (citations omitted).

The Eighth Circuit's election to adopt a construction of H.B. 1010 by which "grave and doubtful constitutional questions" were avoided, led directly to Planned Parenthood's success. Thus, it cannot be said that Planned Parenthood achieved only a "moral" victory. *Compare Farrar v. Hobby*, 506 U.S. 103, 112 (1992). From the outset of this litigation, Planned Parenthood sought to participate in the Department's family planning program. At the conclusion of the litigation, after the Eighth Circuit had stretched to read Missouri's statute in a manner that preserved its constitutionality, Planned Parenthood had obtained just that result. Since that was Planned Parenthood's sole objective, and since the State's goal throughout this lawsuit was to exclude Planned Parenthood from the program and to recover previously disbursed funds, this result unequivocally constituted a material alteration of the legal relationship between the parties that immediately and positively benefitted Planned Parenthood. That fundamental alteration of the legal relationship between Planned Parenthood and the Department, which was entirely to the benefit of Planned Parenthood, rendered Planned Parenthood — not the State — the prevailing party.

As Justice Scalia explained in *Hewitt*, "the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant. . . . [I]f the defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed." 482 U.S. at 760. In *Hewitt*, of course, the plaintiff was deemed not to have prevailed because, "[a]s a consequence of [his] lawsuit, [he] obtained nothing from the defendants." *Id.* Here, in contrast, Planned Parenthood obtained precisely what it had sought from the outset — uninterrupted participation in Missouri's family planning program.

Accordingly, in order to harmonize the Court's traditional principles of constitutional jurisprudence with Congress' clear intention that parties, such as Planned Parenthood, who achieve concrete results in civil rights cases be awarded attorneys fees, the Court should grant certiorari and correct the manifest error of the court below.

II.

THE DECISION BELOW APPLIES THE *ASHWANDER* PRINCIPLES IN A MANNER THAT UNDERMINES THE IMPORTANT CONGRESSIONAL POLICY UNDERLYING THE CIVIL RIGHTS ATTORNEYS FEES ACT.

Congress' principal objective in enacting § 1988 was to promote vigorous advocacy of civil rights claims. *See Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) ("The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances." (quoting H.R. Rep. No. 94-1558 p. 1 (1976))); *id.* at 433 (the purpose of § 1988 is "to encourage private parties to vindicate their federal civil rights") (citation omitted)). By creating a mechanism through which plaintiffs' attorneys may be fairly compensated, Congress sought to encourage the pursuit of cases that might not otherwise be brought. Review by this Court of the Eighth Circuit's ruling is warranted in order to clarify that the *Ashwander* principles discussed above — which require courts, wherever possible, to avoid holding statutes to be unconstitutional — should not compromise this important Congressional policy.

Congress sought to facilitate the prosecution of substantial civil rights claims through the award of attorneys fees to litigants who, for all practical purposes, have prevailed.

Absent corrective action by the Court, however, application of the *Ashwander* principles will materially undermine federal civil rights policy, as lower courts, properly endeavoring to construe statutes in a manner that will preserve their constitutionality, deny prevailing party status to substantively victorious civil rights plaintiffs such as Planned Parenthood.

The *Ashwander* principles embody important, long-held prudential policies of this Court. These principles surely were not intended, however, to diminish the effectiveness of federal civil rights legislation by narrowing or undercutting Congress' pragmatic approach to determining prevailing party status. Yet the Eighth Circuit's decision does just that. Accordingly, by addressing the question presented by this petition, the Court can rectify this erosion of Congressional policy, harmonize prevailing party doctrine with the Court's constitutional jurisprudence, and vindicate a critical element of federal civil rights legislation.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEVEN E. OBUS
Counsel of Record
Proskauer Rose LLP
1585 Broadway
New York, New York 10036
(212) 969-3000

ROGER K. EVANS
Planned Parenthood Legal Defense
Planned Parenthood Federation
of America, Inc.
810 Seventh Avenue
New York, New York 10019
(212) 541-7800

New York, New York
October 8, 1999

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED MAY 25, 1999

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 98-2951WMJC

Planned Parenthood of Mid-Missouri
and Eastern Kansas, Inc.,

Appellee,

vs.

Maureen Dempsey, Director of the Department
of Health of the State of Missouri,

Appellee,

John Doe, 1 thru 99, employees
of the State of Missouri,

Defendant,

State of Missouri,

Appellant.

Appeal from the United States District Court
for the Western District of Missouri

Appendix A

Appellee Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc.'s motion for attorney fees and expenses has been considered by the court and is denied as moot.

May 25, 1999

Order Entered at the Direction of the Court:

s/ [illegible]
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED MARCH 25, 1999

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 98-2951WMJC

Planned Parenthood of Mid-Missouri
and Eastern Kansas, Inc.,

Appellee,

vs.

Maureen Dempsey, Director of the Department
of Health of the State of Missouri,

Appellee,

John Doe, 1 thru 99, employees
of the State of Missouri,

Defendant,

State of Missouri,

Appellant.

Appeal from the United States District Court
for the Western District of Missouri

Appendix B

The Court, having considered several post-judgment motions, hereby orders:

(1) The State of Missouri's motion for leave to file a reply to the State's motion for clarification is granted.

(2) The State of Missouri's motion to file its reply in support of its motion for clarification in excess of ten (10) pages is granted.

(3) Appellee Maureen Dempsey's motion to file out of time a response to the State's motion for clarification is granted.

(4) The State of Missouri's motion for clarification is denied.

(5) Planned Parenthood's request for stay of mandate is denied.

(6) The State of Missouri's motion for costs as the prevailing party is granted. The State is awarded One Thousand Five Hundred Thirty-Three Dollars and Sixty Cents ($1,533.60) as costs.

March 25, 1999

Order Entered at the Direction of the Court:

s/ [illegible]
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED FEBRUARY 3, 1999

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 98-2951

Planned Parenthood of Mid-Missouri
and Eastern Kansas, Inc.,

Plaintiff/Appellee,

v.

Maureen Dempsey, Director of the Department
of Health of the State of Missouri,

Defendant/Appellee,

John Doe, 1 thru 99, employees
of the State of Missouri,

Defendant,

State of Missouri,

Intervenor Defendant/
Appellant.

Appeal from the United States District Court
for the Western District of Missouri.

Appendix C

Submitted: October 22, 1998

Filed: February 3, 1999

Before WOLLMAN, BRIGHT, and HANSEN, Circuit Judges.

WOLLMAN, Circuit Judge.

The State of Missouri appeals from the district court's grant of preliminary and permanent injunctions against the enforcement of section 10.715 of the Missouri code, which prevents abortion service providers from receiving state family-planning funds. We vacate the injunctions and remand with directions.

I.

Missouri appropriates funds to assist low-income residents with family planning. As a qualified family-planning service provider, Planned Parenthood has received funds since this program began in 1993. It provides both family-planning and abortion services, sometimes using the same facilities and marketing materials for both services. Until 1996, Planned Parenthood was allowed to receive program funds because it maintained accounting procedures that assured the State that no family-planning funds were spent on abortion services.

In 1996, however, the Missouri legislature decided to prohibit organizations that provide abortion services from receiving family-planning funds. According to the State,

abortion service providers like Planned Parenthood were receiving indirect benefits from family-planning funds through shared revenue, marketing expenses, and fixed expenses, and through the "imprimatur of the state." Believing that these benefits contradicted Missouri's policy of encouraging childbirth over abortion, the Missouri legislature enacted statutes for fiscal years 1996 and 1998 that attempted to prohibit abortion service providers from receiving funds. These statutes were held to be unconstitutional by the district court, decisions which the State did not appeal. Instead, for fiscal year 1999 the Missouri legislature devised the three-tiered approach that is at issue in this case. *See* H.B. 1010, § 10.715, 89th Leg., 2d Sess. (Mo. 1998).

Tier I of section 10.715 prohibits family-planning funds from being used to perform, assist, encourage, or make direct referrals for abortions. In addition, it provides that organizations or affiliates of organizations that "provide or promote abortions" are not eligible for family-planning funds. *Id.*

Tier II takes effect only if Tier I is found unconstitutional. It provides funds only to organizations that qualify under specified state and federal statutes. Tier III takes effect only if both Tiers I and II are found unconstitutional. It provides family-planning funds only to the Missouri Department of Health and its subagencies. Planned Parenthood would not qualify for funds under Tier II or Tier III.

Planned Parenthood brought the present action to enjoin the enforcement of section 10.715. It claimed that the statute

placed an unconstitutional condition on the receipt of state funds, violated the Equal Protection Clause, and constituted a bill of attainder. The district court found that the entire three-tiered scheme violated the Equal Protection Clause and declined to discuss the other grounds for the challenge.

II.

We review de novo the constitutionality of a statute. *See United States v. McMasters*, 90 F.3d 1394, 1397 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 783 (1997). The starting point in statutory interpretation is always the plain language of the statute itself. *See United States v. S.A.*, 129 F.3d 995, 998 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1200 (1998). When language is ambiguous, however, and "an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems," unless such a construction is plainly contrary to legislative intent. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504 (1979)). The ultimate question is whether the statute "can be construed in such a manner that [it] can be applied . . . without infringing upon constitutionally protected rights." *Rust v. Sullivan*, 500 U.S. 173, 183 (1991).

A. Unconstitutional Conditions

Neither Congress nor the states may condition the granting of government funds on the forfeiture of constitutional rights. *See Speiser v. Randall*, 357 U.S. 513,

518-19 (1958) (holding unconstitutional the denial of a tax exemption based on the content of claimant's speech); *Shapiro v. Thompson*, 394 U.S. 618, 634-35 (1969) (finding residency requirements for welfare benefits unconstitutional as an infringement on the right to travel); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (holding that although a person has no "right" to noncontractual government benefits, it is unconstitutional to deny such benefits in a way that interferes with constitutional rights). As a result, funding classifications that interfere with the exercise of constitutional rights must be "necessary to promote a *compelling* governmental interest." *Shapiro*, 394 U.S. at 634; *see also Speiser*, 357 U.S. at 529.

Not all funding classifications, however, can be said to actually interfere with constitutional rights. *See Rust*, 500 U.S. at 196-98; *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 509-10 (1989). A refusal to fund the exercise of a constitutional right, without more, is not an infringement on that right. *See Rust*, 500 U.S. at 193; *Harris v. McRae*, 448 U.S. 297, 316-18 (1980); *Maher v. Roe*, 432 U.S. 464, 474-75 (1977). Generally, states may fund programs they believe are beneficial to the public to the exclusion of alternative programs. *Rust*, 500 U.S. at 193. Therefore, a state may validly choose to fund family-planning services but not abortion services. *See id.* at 192-93; *Webster*, 492 U.S. at 509; *McRae*, 448 U.S. at 316-17. As the Court held in *Maher*, the constitutional right of a woman to an abortion "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." 432 U.S. at 474.

Appendix C

The Supreme Court has attempted to demarcate a line, past which funding conditions constitute too great an interference with the exercise of fundamental rights to be deemed constitutional. In *Maher*, the Court held that states are not required to fund abortions. The Court went on to indicate, however, that a state's denial of all welfare benefits to otherwise qualified women who choose to have abortions might well be subject to strict scrutiny review. 432 U.S. at 474 n.8. In *McRae*, the Court analogized the denial of welfare benefits for women who have abortions to the denial of unemployment benefits for people who refuse to work on the Sabbath, which is clearly unconstitutional. *See* 448 U.S. at 317 n.19 (citing *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963)). "A substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate exercised her constitutionally protected freedom to terminate her pregnancy by abortion." *Id.*

In *Rust*, the Supreme Court spoke more directly about the line between constitutional and unconstitutional funding conditions. *See* 500 U.S. at 196-98. Legislation that simply dictates the proper scope of government-funded programs is constitutional, while legislation that restricts protected grantee activities outside government programs is unconstitutional:

> Title X expressly distinguishes between a Title X *grantee* and a Title X *project*. . . . The regulations govern the scope of the Title X *project's* activities, and leave the grantee unfettered in its other activities. The Title X

> *grantee* can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.

Id. at 196. The regulations found constitutional in *Rust* required abortion activities to be "physically and financially separate" from government-funded projects. *Id.* at 180-81.

The Supreme Court has addressed the degree of independence that funding conditions may require of grantees' privately funded, protected conduct in non-abortion cases. In *F.C.C. v. League of Women Voters*, the Court found the Public Broadcasting Act unconstitutional because it prohibited grantees from editorializing, even if such activities were conducted outside the scope of the government program. *See* 468 U.S. 364, 400 (1984). The Court held that the statute would have been constitutional, however, had it allowed grantees to establish affiliates to editorialize. *Id.* In *Regan v. Taxation With Representation*, the Court held that a refusal to fund grantees' lobbying activities was constitutional because it allowed them to engage in the protected conduct through independent affiliates. *See* 461 U.S. 540, 544-45 (1983). *See also National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2179 (1998) (upholding legislation funding only certain types of art because the legislation did not infringe on protected grantee activities outside the government program).

The question before us, then, is whether the legislation in the present case constitutionally restricts the use of

funds within the State family-planning program or unconstitutionally restricts grantee activities outside the program. Specifically, we must decide whether section 10.715 prohibits grantees from engaging in abortion services through independent affiliates.

Tier I of section 10.715 designates funds to the Department of Health:

> For the purpose of funding family planning services, pregnancy testing and follow-up services, provided that none of these funds may be expended for the purpose of performing, assisting or encouraging for abortion, and further provided that none of these funds may be expended to directly or indirectly subsidize abortion services or administrative expenses, as verified by independent audit. None of these funds may be paid or granted to organizations or affiliates of organizations which provide or promote abortions. None of the funds may be expended for directly referring for abortion, however nondirective counseling relating to the pregnancy may be provided and nothing in this section requires an agency receiving federal funds pursuant to Title X of the Public Health Services Act to refrain from performing any service required pursuant to Title X, regulations adopted pursuant to Title X or the Title X Program Guidelines for Project Grants for Family Planning Services as published by the U.S. Department of Health and Human Services in order to remain

> eligible to receive Title X funds, to be eligible to receive state funds pursuant to this section.

H.B. 1010, § 10.715(1), 89th Leg., 2d Sess. (Mo. 1998).

Although Tier I provides that "organizations or affiliates of organizations which provide or promote abortions" are not eligible for family-planning funds, nothing in Tier I expressly prohibits grantees from maintaining an affiliation with an abortion service provider, so long as the affiliated abortion service provider does not directly or indirectly receive State family-planning funds. Tier I is therefore facially ambiguous regarding whether an organization that receives State funds may be affiliated with an abortion service provider. Several factors weigh in favor of interpreting Tier I to allow such affiliations, however.

Although it does not define the term "promote abortions," Tier I expressly prohibits only "assisting or encouraging for abortion" and "directly referring for abortion." It specifically allows grantees to provide "nondirective counseling relating to the pregnancy." Furthermore, the State has acknowledged that Tier I allows grantees to advocate in favor of abortion outside of any patient relationship and so long as that speech occurs with private funds and outside the scope of the program. *See* Appellant's Br. at 14.

In addition, Tier I would cross the line established in *Rust*, *League of Women Voters*, and *Regan*, and hence be an unconstitutional condition, if we interpreted it to prohibit grantees from having any affiliation with abortion service

providers. We interpret statutes to avoid serious constitutional problems, so long as the statutory language is fairly susceptible to a constitutional construction. Accordingly, we construe the language of Tier I to allow a grantee to maintain an affiliation with an abortion service provider, so long as that affiliation does not include direct referrals for abortion. Under this construction, Tier I is not an unconstitutional condition, because it allows grantees to exercise their constitutionally protected rights through independent affiliates.

To remain truly "independent," however, any affiliate that provides abortion services must not be directly or indirectly subsidized by a section 10.715 grantee. This will ensure that State funds are not spent on an activity that Missouri has chosen not to subsidize. *See Regan*, 461 U.S. at 544. No subsidy will exist if the affiliate that provides abortion services is separately incorporated, has separate facilities, and maintains adequate financial records to demonstrate that it receives no State family-planning funds. *See Rust*, 500 U.S. at 180-81 (requiring abortion services to be physically and financially separate from government-funded program); *Regan*, 461 U.S. at 544 n.6 (requiring affiliate to be separately incorporated and to not receive any government funds); *Legal Aid Soc'y of Hawaii v. Legal Servs. Corp.*, 145 F.3d 1017, 1025 (9th Cir.), *cert. denied*, 119 S. Ct. 539 (1998) (upholding regulations requiring affiliates to be separately incorporated and to remain physically and financially independent).

This interpretation of Tier I respects the State's valid policy decision to remove its imprimatur from abortion

services and to encourage childbirth over abortion. By requiring abortion services to be provided through independent affiliates, Tier I ensures that abortion service providers will not receive benefits in the form of marketing, fixed expenses, or State family-planning funds from section 10.715 grantees. It respects Planned Parenthood's constitutional rights by allowing it to establish an independent affiliate to provide abortion services outside the government program. *See Rust*, 500 U.S. at 198; *Regan*, 461 U.S. at 545. The Constitution does not guarantee that recipients of State funds will not be required to "expend effort" to comply with funding restrictions. *See Legal Aid of Hawaii*, 145 F.3d at 1027 (citing *Rust*, 500 U.S. at 196).

B. Equal Protection

Planned Parenthood also argues that Tier I violates the Equal Protection Clause by discriminating against organizations that provide abortion services. This argument is based on the notion that physicians and clinics have a fundamental constitutional right to provide abortion services. Generally, "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966). *See also Clark v. Jeter*, 486 U.S. 456, 461 (1988) (holding that classifications affecting fundamental rights are subject to the "most exacting scrutiny").

Any constitutional right of clinics to provide abortion services, however, is derived directly from women's

constitutional right to choose abortion. *See Planned Parenthood v. Casey*, 505 U.S. 833, 884-85 (1992). In *Casey*, the Supreme Court set out a new standard of review for regulations that touch upon the right to abortion. *See id.* at 871-74 (holding that strict scrutiny does not apply to regulations affecting the right to abortion). Legislation affecting physicians and clinics that perform abortions, like all legislation affecting abortion access, will be found unconstitutional if it imposes an "undue burden" on women seeking abortions. *Id.* at 884-85. Since *Casey*, we have applied the undue burden test in cases involving legislation that affects the right to abortion. *See Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1457-58 (8th Cir. 1995) (finding parental notice requirements unconstitutional under the undue burden test); *Planned Parenthood of Greater Iowa, Inc. v. Atchison*, 126 F.3d 1042, 1048-49 (8th Cir. 1997) (finding state enforcement of clinic certificate-of-need requirements unconstitutional under the undue burden test).

A statute that affects the right to abortion is an undue burden if it has the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion." *Casey*, 505 U.S. at 877. "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Id.* at 874. *Cf. Atchison*, 126 F.3d at 1048-49 (finding an undue burden where regulations served no purpose other than restricting abortion access).

The district court made limited factual findings regarding the purpose and effects of section 10.715. *See* Order of July

17, 1998; Order of June 27, 1996. With respect to legislative purpose, the district court found that the legislature intended to discriminate against abortion service providers in granting State family-planning funds. *See* Order of July 17, 1998, at 5-6 (citing Order of June 27, 1996). Rather than focusing on this discrimination, however, which is plainly allowed under cases such as *Maher*, *Harris*, and *Rust*, *see supra* Part II.A, the district court should have focused on whether the legislature intended to place an undue burden in the path of women seeking abortions. The district court could not have found that the legislature intended section 10.715 to be an undue burden on women's access to abortion, because nothing in the record demonstrates such a motive.

To the contrary, the record suggests that the legislature was aware that denying Planned Parenthood's family-planning funds would not affect Planned Parenthood's ability to provide abortion services. Consistent with our interpretation of Tier I in Part II.A above, the comments of the legislators show that discriminating against abortion providers in granting state funds was primarily intended to remove the imprimatur of the State from abortion services. *See* Statements of Rep. from Jasper County, Appellant's Appx. at 454-55, 476; Statement of Sen. from Boone County, Appellant's Appx. at 401; Statement of Rep. from Buchanan County, Appellee's Appx. at 362; Statement of Sen. from Texas County, Appellant's Appx. at 362.

Nor would Tier I have the effect of placing an undue burden on women seeking abortion services, for the statute would have at most an extremely attenuated effect upon the availability of abortion services. Under *Casey*, incidental

effects are not enough to render unconstitutional a regulation touching on abortion.

Moreover, Planned Parenthood has consistently maintained that State family-planning funds do not subsidize abortion services in any way. Instead, abortion services are funded through independent private sources. Because nothing in section 10.715 restricts Planned Parenthood's use of private funds, it cannot claim that denying it family-planning funds would unduly burden women's access to abortion services.

Tier I is fundamentally different from the statute at issue in *Atchison*, which we found to serve "no purpose other than to make abortions more difficult." *See* 126 F.3d at 1049. The statute is intended to effectuate the State's constitutionally permissible decision to favor childbirth over abortion, and any effects limiting women's access to abortion services are strictly incidental and do not constitute an undue burden on a woman's right to abortion.

C. Bills of Attainder

Finally, Planned Parenthood argues that section 10.715 is an unconstitutional bill of attainder because it imposes "punishment" without a trial. *See Selective Serv. Sys. v. Minnesota Pub. Interest Res. Group*, 468 U.S. 841, 846-47 (1984); U.S. Const. art. I, § 9, cl. 3. To constitute a bill of attainder, the statute must (1) specify affected persons, (2) impose punishment, and (3) fail to provide for a judicial trial. *See Selective Service*, 468 U.S. at 847. Planned Parenthood's claim fails because Tier I of section 10.715 does not impose punishment.

Appendix C

To rise to the level of "punishment" under the Bill of Attainder Clause, harm must fall within the traditional meaning of legislative punishment, fail to further a nonpunitive purpose, or be based on a congressional intent to punish. *See id.* at 852 (citing *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 473 (1977)). The denial of a noncontractual government benefit will not be deemed punishment if the statute "leaves open perpetually the possibility of qualifying for aid." *Id.* at 853. Tier I allows Planned Parenthood to qualify for family-planning funds by establishing an independent affiliate to perform its abortion services. Accordingly, it does not fall within the traditional meaning of legislative punishment. *See id.* at 852-53. Further, it serves the nonpunitive interest of removing the State's imprimatur from abortion services, and it was not intended to punish Planned Parenthood for its abortion activities.

III.

Because section 10.715, as we have construed it, passes constitutional muster, we vacate the preliminary and permanent injunctions entered by the district court, and we remand the case with directions that the complaint be dismissed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION DATED AND FILED JULY 17, 1998

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 96-4186-CV-C-2

PLANNED PARENTHOOD OF MID-MISSOURI AND EASTERN KANSAS, INC.,

Plaintiff,

vs.

MAUREEN DEMPSEY, et al.

Defendants.

ORDER

Currently pending before the Court is Plaintiff's motion for a Preliminary Injunction and Defendant's Motion to Clarify. As both of these motions relate to H.B. 1010, § 10.715 which appropriates funds to the Department of Health for the purpose of funding family planning services for Fiscal Year 1999, they will be considered together.

PROCEDURAL HISTORY

In 1996, the Missouri Legislature enacted H.B. 10, §10.680 which appropriated funds to the Department of

Appendix D

Health for the purpose of funding family planning services for Fiscal Year 1996. Planned Parenthood filed a Complaint for Declaratory and Injunctive Relief on May 16, 1996. This Court issued an Amended Order on June 27, 1996 in which the Court found that the exclusion of Planned Parenthood violated the equal protection clause and enjoined defendants from excluding Planned Parenthood from participation in the program.

In 1997, the Missouri Legislature enacted an appropriations bill (H.B. 20, § 20.685) which provided funding to the Department of Health for the purpose of providing family planning services, pregnancy testing, and follow up services. The bill also contained a three tiered eligibility restrictions for participation in the program. In response to a motion by defendants to clarify the application of this Court's previous orders, this Court found that the June 27, 1996 amended order applied to House Bill 20 and that implementation of any of the restrictions following the first sentence of section 20.685.1 would violate not only the spirit of the amended order but its letter as well. (See Order dated June 30, 1997).

In 1998, the Missouri Legislature once again passed appropriations legislation for the Department of Health which sets out a three tiered eligibility restriction scheme. Tiers I and II are substantially similar to last years Tier I and Tier II restrictions. However, the difference is that in this year's bill under Tier III, funding will be provided only to certain governmental entities including agencies of the United States, the State of Missouri, political subdivisions or directly by public health entities through contractual agreement with the Department of Health.

Appendix D

In support of its motion for a preliminary injunction, plaintiff submitted the Declarations of Patricia A. Brous, (President of Planned Parenthood of Mid-Missouri and Eastern Kansas), and Erika Fox, (Vice President for Public Policy for Planned Parenthood of Mid-Missouri and Eastern Kansas), with several exhibits attached. Plaintiff has also submitted transcripts of debates of the Missouri General Assembly. Defendant, Maureen Dempsey, Director of Missouri Department of Health submitted Suggestions in Opposition to Plaintiff's Motion for a Preliminary Injunction. In addition, Intervenor, the State of Missouri, represented by Special Assistant Attorney General, Jordan Cherrick also submitted Suggestions in Opposition to Plaintiff's Motion for Preliminary Injunction along with the declaration of an expert witness and several exhibits. The Intervenor also submitted suggestions in Opposition to Defendants' Motion to Clarify. On July 16, 1998, the Court conducted a telephonic hearing and heard arguments of counsel.

MOTION FOR PRELIMINARY INJUNCTION

The factors a court must consider in ruling on a motion for preliminary injunction include: 1) probability that plaintiff will succeed on the merits; 2) threat of irreparable harm to plaintiff; 3) the balance between that harm and the injury an injunction would cause the defendant; and 4) the public interest. *Dataphase Systems, Inc. v. CL Systems, Inc.*, 640 F.2d 109, 113-114 (8th Cir.1981). These factors were considered and applied by the Court in its 1996 Amended Order. The restrictions challenged in 1996 are not materially different than the eligibility restrictions which are currently at issue. Therefore, the Court will adopt the analysis and

reasoning contained in that opinion. Accordingly the Court will grant Planned Parenthood's motion for a preliminary and permanent injunction.

MOTION FOR CLARIFICATION

Upon review of all of the information submitted, the Court finds that there is no material difference between the three tiered eligibility restrictions contained in House Bill 1010 § 10.715 and the eligibility restrictions contained in last year's appropriations bill. Accordingly, the Court find that the June 27, 1996 Amended Order applies to House Bill 1010 and specifically to Section 10.715.

SEVERABILITY

Intervenor, the State of Missouri, asserts that if any of the three tiers are found to be unconstitutional, then the entire appropriation should fail. However, defendant, Secretary of Missouri Department of Health, asserts that in the event any tier of Section 10.715 is found invalid, it should be severed and the appropriation should be allowed to remain. The Secretary of Health notes that the legislature had the option of providing that if all three tiers should fail then no money would be appropriated. However, the Secretary correctly points out that the legislature did not do so.

Questions regarding severability of state statutes are governed by state law. *Kinley Corp. v. Iowa Utilities Board*, 999 F.2d 354, 359 (8th Cir. 1993). Under Missouri law, valid provisions of a statute must be severed and upheld unless

> the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Mo.Rev. Stat. 1.140. Section 10.715 specifically provides that if one of the Tiers is found to be invalid, then the appropriation shall be in accordance with the next tier. Thus, it is apparent that the separate provisions of the statute are not inseparably connected and are capable of severance. Accordingly, the Court finds that the three tiered eligibility restriction should be severed from the remainder of Section 10.715 and the remaining appropriation allowed to stand.

The defendants, the Secretary of Missouri Department of Health, and the Intervenor, the State of Missouri, have submitted various and sundry arguments in support of their position that H.B. 1010 is constitutional. Although these specific arguments may not have been specifically addressed in previous orders, the Court has reviewed and considered these arguments. However, the Court recognizes these arguments as mere subterfuge for the real reason Planned Parenthood was excluded from participation in the state funded family planning program. That reason is Planned Parenthood's participation in privately funded abortion related activities. Accordingly, it is hereby **ORDERED** that:

(a) the June 27, 1996, amended order applies to House Bill 1010, and specifically to the provisions of section 10.715;

(b) based on the text of section 10.715, and alternatively on the record before the court, and for the reasons set forth in the June 27, 1996 amended order, implementation of any of the restrictions following the first sentence of section 10.715 would violate the amended order;

(c) under the Fourteenth Amendment to the United States Constitution, defendants may not exclude plaintiff from the Program because plaintiff with its private funds provides abortions and engages in public advocacy to protect safe and legal abortion services;

(d) defendants are therefore enjoined from excluding plaintiff from the Program because plaintiff with its private funds provides abortions and engages in public advocacy to protect safe and legal abortion services;

(e) consistent with the foregoing, upon receipt of a proposal from plaintiff for Program funding, defendants may not evaluate plaintiff's proposal employing criteria other than criteria applied to all other entities from whom defendants entertain proposals.

s/ Fernando J. Gaitan, Jr.
Fernando J. Gaitan, Jr.
United States District Judge

Dated: JUL 17 1998
Kansas City, Missouri

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION DATED AND FILED JUNE 30, 1997

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 96-4186-CV-C-2

Planned Parenthood of Mid-Missouri
and Eastern Kansas, Inc.,

Plaintiff,

vs.

Maureen Dempsey[1], et al.,

Defendants.

ORDER

On June 27, 1996, this Court entered an amended order that, *inter alia*, permanently enjoined defendants from excluding plaintiff from eligibility for participation in the program because plaintiff with it private funds provides abortions and engages in public advocacy regarding legal abortion services.

On June 26, 1997, the state of Missouri enacted its appropriation for the 1997-1998 fiscal year, House Bill No.

---

1. Colleen Kivlahan was the Director of the Department of Health and a named defendant when the instant suit was initiated. Since that time, Dr. Kivlahan has resigned and has been replaced by Maureen Dempsey, whose name is substituted pursuant to Rule 25(d).

20, in which section 20.685 appropriates funds for the program, and contains restrictions on eligibility for participation in the program.

On June 27, 1997, defendants filed a motion to clarify the application of the 1996 amended order to House Bill No. 20.

On June 30, 1997, plaintiff filed suggestions responding to defendants' motion, the declaration of Erika Fox, and attached exhibits, to which defendants do not dispute.

On June 30, 1997, the Court heard arguments of counsel.

Now, it is hereby

Ordered that the June 27, 1996, amended order applies to House Bill 20, and specifically to the provisions of section 20.685; and it is further

Ordered that, based on the text of section 20.685, and alternatively, on the record before the Court, and for the reasons set forth in the June 27, 1996 amended order, implementation of any of the restrictions following the first sentence of section 20.685.1 would violate not only the spirit of the amended order, but its letter as well.

s/ Fernando J. Gaitan, Jr.
Fernando J. Gaitan, Jr.
United States District Judge

Dated: JUN 30 1997
Kansas City, Missouri

APPENDIX F — AMENDED ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION DATED AND FILED JUNE 27, 1996

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Case No. 96-4186-CV-C-2

Planned Parenthood of Mid-Missouri
and Eastern Kansas, Inc.,

Plaintiffs,

vs.

Colleen Kivlahan, et al.,

Defendants.

AMENDED ORDER

I. INTRODUCTION

Plaintiff Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. ("Planned Parenthood") is a not-for-profit corporation organized under the laws of Missouri. In December of 1995, Planned Parenthood was formed by the merger of two pre-existing corporations: Planned Parenthood of Greater Kansas City, Inc. and Planned Parenthood of Central Missouri, Inc. Planned Parenthood operates nine

clinics in the State of Missouri, providing family planning and related medical services to residents of twenty-six Missouri counties. Abortions are performed at two of Planned Parenthood's nine clinics. Planned Parenthood also engages in public advocacy to protect safe and legal access to abortion services for all women.

Since 1993, the State of Missouri has appropriated funds to finance comprehensive family-planning service for low-income women and men who do not qualify for Medicaid benefits. Officials of the State of Missouri contract with various public and private entities to provide these services. Under the contracts ("Program"), the provider entities are reimbursed by the State for each eligible patient it served. From 1993 to 1995, Planned Parenthood received reimbursement from the Program for services provided to eligible patients. However, pursuant to the Director's interpretation of the intent of the Missouri Legislature, Planned Parenthood has been excluded from eligibility for the state-funded family planning services contracts.

Planned Parenthood maintains that defendants have excluded it from these contracts because it uses its own private funds, raised from private sources, to provide abortions and to engage in public advocacy and education to protect a woman's right to safe and legal abortion. To this end, Planned Parenthood seeks a judgment declaring that

---

1. Planned Parenthood maintains that its services include a broad range of medical services such as diagnosis and treatment of sexually transmitted infections as well as vaginal and urinary tract infections, screening for cancer, hypertension, blood sugar, and sickle cell anemia.

defendants' exclusion of it from eligibility for state-appropriated family-planning funds violates Planned Parenthood's rights under the First and Fourteenth Amendments of the United States Constitution. Additionally, Planned Parenthood seeks an injunction staying defendants from excluding it from eligibility for state appropriated family planning funds. On June 19, 1996, the Court heard oral arguments from both parties. For the reasons discussed more fully below, the Court will grant Planned Parenthood's motions for preliminary and permanent injunctions.

II. DISCUSSION

A. ELIGIBILITY FOR FAMILY PLANNING CONTRACTS

In May of 1995, the State of Missouri enacted appropriations legislation for the Department of Health for 1995-1996. That legislation, House Bill No. 10, included over 1.3 million dollars in general revenue for family-planning services. House Bill No. 10 expressly limits eligibility for family planning funds to:

> [P]rivate physicians' offices, public and private hospitals, public health agencies, federally-qualified health centers, community health centers, rural health clinics, community action agencies, and the Department of Health's administrative agent for family planning by contract, which provides no patient care, for distribution to the above entities, and the Department of Health's administrative agent who

> contracts with not-for-profit corporations providing primarily mental health services with family planning offered only in conjunction with mental health services.

Planned Parenthood contends, and defendants do not deny, that of the entities that received state-appropriated family-planning funds in 1994-1995 but were subsequently excluded in 1995-1996, only Planned Parenthood performs abortions. Planned Parenthood contends that the state's refusal to contract with them as a service provider was solely because it provides abortions and engages in public advocacy and education concerning abortions.

Planned Parenthood maintains that by the end of fiscal year 1996, it projects that it will have served approximately 1000 family-planning patients for whom it would have received reimbursement but for the defendants' interpretation of legislative intent. Planned Parenthood recognizes that under Missouri law, the Department cannot pay for past services. Moreover, Planned Parenthood correctly notes that under the Eleventh Amendment of the United States Constitution, the State of Missouri is immune from an action by Planned Parenthood to recoup the money it will have spent on patients that are eligible for the program. Therefore, Planned Parenthood maintains, absent an order for injunctive relief by June 30, 1996 enjoining the defendants from excluding Planned Parenthood as a service provider simply because Planned Parenthood with its private funds provides abortions, or engages in advocacy to protect safe and legal

---

2. See Missouri Constitution Art. IV § 28.

access to abortion Planned Parenthood will be left with no remedy for its injury. To this end, Planned Parenthood moves for a preliminary injunction and permanent injunction.

B. STANDARDS GOVERNING PRELIMINARY INJUNCTIONS

Planned Parenthood seeks a preliminary injunction barring its exclusion from state-appropriated family-planning funds. As the Eighth Circuit stated in ***Dataphase Systems, Inc. v. C L Systems, Inc.***, 640 F.2d 109, 113 (8th Cir. 1981), "[w]hether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." Id. In the interest of clarity, the Court will discuss each factor in turn.

I. Likelihood of Success

In support of their position, Planned Parenthood advances three arguments. First, they contend that exclusion from eligibility for contracting to provide family planning services deprives it of equal protection of the law. Next, it contends that the exclusion unconstitutionally penalizes plaintiff's protected speech and abortion related activities.

---

3. June 30, 1996 begins the new fiscal year for purposes of this action. In sum, Planned Parenthood maintains absent an order from the Court enjoining defendants from excluding Planned Parenthood from the Program, the opportunity to contract with the Department will not be available.

Finally, it contends that the exclusion is unconstitutional as an illegal bill of attainder. Because the Court finds that the exclusion violates equal protection of the laws as guaranteed by the Constitution, it need not address Planned Parenthood's protected speech or bill of attainder arguments.

a. Equal Protection

At a minimum, the defendants' distinction between Planned Parenthood and all other eligible entities must be rationally related to a legitimate governmental purpose. ***See United States Dept. of Agriculture v. Moreno***, 413 U.S. 528 (1973); ***Planned Parenthood of v. State of Minnesota***, 612 F.2d 359 (1980); ***Planned Parenthood of Kansas Inc. v. City of Wichita***, 729 F. Supp. 1282 (D. Kansas 1990). Defendants argue that the distinction is related to the State of Missouri's stated public policy of not promoting or encouraging abortions. Defendants reason that the State of Missouri should be able to, and indeed can, contract with entities that operate in a manner consistent with the policies the State of Missouri seeks to further. Defendants claim, relying, in part, on ***Regan v. Taxation with Representation of Washington***, 461 U.S. 540 (1983), that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right. Thus, defendants' argument goes, the State of Missouri can prohibit the use of public facilities for abortions and the use of public funds, employees or facilities for the purpose of encouraging or counseling abortions when such is not necessary to save the mother's life. Defendants' argument, however, misses the mark.

Defendants are certainly correct in asserting that the State of Missouri has no positive obligation to fund or subsidize

certain activities, including abortions. ***See Webster v. Reproductive Health Services***, 492 U.S. 490 (1989). It is, however, equally clear that the government may not punish an entity by refusing to contract with it because that entity's agenda may be politically unpopular. **Moreno,** 413 U.S. at 534; **Planned Parenthood of Minnesota,** 612 F.2d at 361. Indeed, if the concept of equal protection of the laws is to have any substance, "it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute legitimate governmental interest." **Moreno,** 413 U.S. at 534. Put succinctly, the state of Missouri may not deny a benefit to an entity on a basis of its politically unpopular beliefs. **Perry v. Sindermann,** 408 U.S. 593, 597 (1972); **Planned Parenthood of Minnesota,** 612 F.2d at 361. In the case at bar, the Court can find no rational basis for the distinction between Planned Parenthood and the other eligible recipients for the state appropriated family-planning funds.

In the case at bar, Planned Parenthood is deprived of the benefit of state appropriated funding simply because of the unpopularity of its convictions. The exclusion of Planned Parenthood because of its abortion activities does not further a legitimate governmental purpose. The exclusion, instead, unconstitutionally denies Planned Parenthood equal protection of the laws as guaranteed by the Fourteenth Amendment. This Court is mindful of the Supreme Court's reluctance "to attribute unconstitutional motives to the state, where a plausible [constitutional] purpose may be discovered from the face of the statute." ***Mueller v. Allen***, 463 U.S. 388, 394-95 (1983). However, other than a perceived legislative desire to exclude Planned Parenthood because of

its performance and advocacy to protect a woman's access to abortion, the Court can find no reason for the refusal to contract with Planned Parenthood. This Court similarly finds that the record is devoid of any legitimate rationale which would justify the distinction between Planned Parenthood and other family planning organization approved for state-appropriated funding. ***Planned Parenthood of Kansas***, 729 F.Supp at 1290.

The exclusion of Planned Parenthood violates equal protection of the law protected by the United States Constitution and may be enjoined. Planned Parenthood has therefore satisfied the likelihood of success component of the analysis.

2. Irreparable Harm

In order to secure a preliminary injunction, Planned Parenthood must prove that there is a threat of irreparable harm if the injunction is not granted. Defendants argue that because Planned Parenthood filed this motion in a dilatory fashion, the motion for preliminary injunction should be denied. In sum, defendants maintain that Planned Parenthood's delay in bringing the application for injunctive relief rebuts the presumption of irreparable harm. The Court disagrees. Planned Parenthood contends that because of the state's indecision in regard to its eligibility, Planned Parenthood held out hope for settlement and consequently did not press forward with this litigation. Planned Parenthood maintains that after learning that in fact it had been excluded, it spent the next several months engaged in a good faith attempt with various state officials to resolve this matter short

of litigation. Planned Parenthood testified that after it became clear that these negotiations would not being a resolution before June 30, 1996, Planned Parenthood brought this application for injunctive relief. Under the circumstances, the Court finds Planned Parenthood's delay in bringing the application for preliminary injunctive relief reasonable.

It is well-settled that a showing by a movant of interference with the exercise of constitutional rights will support a finding of irreparable harm. ***Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action***, 558 F.2d 861, 867 (8th Cir. 1977) (citing 11 C. Wright and A. Miller, Federal Practice and Procedure § 2948 at 440 (1973)). As noted in the court's discussion of Planned Parenthood's likelihood of success on the merits, Planned Parenthood has made a sufficient showing that its exclusion from the program interferes with its Fourteenth Amendment rights. Therefore, Planned Parenthood has satisfied the irreparable harm component of the ***Dataphase*** test.

3. Injury to Defendants

Under the ***Dataphase*** analysis, Planned Parenthood must demonstrate that their threatened injury outweighs any damage the injunction may cause to the defendants. As previously discussed, the exclusion poses a serious threat to Planned Parenthood's constitutionally guaranteed right to equal protection of the law. On the other hand, the Court finds no serious damage to the defendants if the injunction is imposed. If the injunction is imposed, defendants would be prohibited from excluding Planned Parenthood simply because with its private funds it provides or advocates to

protect a woman's access to abortions. The Court notes that there have been no allegations of misconduct in regard to the services Planned Parenthood provides. Therefore, an injunction which prohibits the defendants from excluding an agency which, but for its abortion related activities, did a satisfactory job cannot be accurately characterized as harmful to the defendants. Therefore, Planned Parenthood has satisfied this element.

4. Public Interest

Injunctive relief in the case at bar will not adversely affect the public interest. Planned Parenthood provides services to residents of twenty-six counties in the state of Missouri. Its services, however, are not limited to abortion related issues. Indeed, Planned Parenthood provides a wide range of family services to low income patients who may have insufficient means to pay for these services otherwise. As such, Court finds that it is not adverse to the public interest to grant Planned Parenthood's motion for a preliminary injunction.

Accordingly, based upon the foregoing analysis, the Court will grant Planned Parenthood's application for a preliminary injunction.

C. PERMANENT INJUNCTION

Like a preliminary injunction, the Court must consider the ***Dataphase*** factors discussed above. When considering a motion for a permanent injunction, the standard is the same, except that the Court determines the success on the merits

rather than a mere likelihood of success. ***Amaco Production Co. v. Village of Gambell, Alaska***, 480 U.S. 531, 546 (1987) (citations emitted); ***Sherwood Ford, Inc. v. Ford Motor Co.***, 875 F. Supp. 590, 1593 (E.D. Mo. 1995). To this end, the Eighth Circuit has recently reasoned that in order for a district court to grant a permanent injunction, the plaintiff must show that it will suffer irreparable harm it the injunction is not granted. ***United States v. Green Acres Enterprises, Inc.*** No. 95-2541, 1996 WL 312232, at * 2 (8th Cir., June 12, 1996).

Based upon the Court's careful review of the pleadings as well as the parties' testimony at the oral arguments, the Court is persuaded that Planned Parenthood has not only succeeded on the merits, but also will suffer irreparable harm if the injunction is not granted. As previously discussed, a showing by a movant of interference with the exercise of constitutional rights will support a finding of irreparable harm. ***Planned Parenthood***, 558 F. 2d at 867 (citations omitted). The Court finds that Planned Parenthood has made a sufficient showing that the defendants' decision to exclude Planned Parenthood abridged its constitutionally protected right to equal protection of the laws. Therefore, Planned Parenthood's motion for permanent injunction is granted.

III. CONCLUSION

Accordingly, it is **ORDERED**

(a) That under the Fourteenth Amendment to the United States Constitution, defendants may not exclude plaintiff from the Program because plaintiff with its private funds provides abortions and engages in public advocacy to protect safe and legal abortion services;

(b) That defendants are therefore enjoined from excluding plaintiff from the Program because plaintiff with its private funds provides abortions and engages in public advocacy to protect safe and legal abortion services;

(c) That, consistent with the foregoing, defendants may not preclude plaintiff from submitting proposals for Program funding directly or through an intermediary, such as the Missouri Family Health Council;

(d) That, consistent with the foregoing, upon receipt of a proposal from plaintiff for Program funding, defendants may not evaluate plaintiff's proposal employing criteria other than criteria applied to all other entities from whom defendants entertain proposals.

s/ Fernando J. Gaitan, Jr.
Fernando J. Gaitan, Jr.
United States District Judge

Dated: JUN 27 1996

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING DATED MAY 11, 1999

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 98-2951WMJC

Planned Parenthood of Mid-Missouri
and Eastern Kansas, Inc.,

Appellee,

vs.

Maureen Dempsey, Director of the Department
of Health of the State of Missouri,

Appellee,

John Doe, 1 thru 99, employees
of the State of Missouri,

Defendant,

State of Missouri,

Appellant.

Appeal from the United States District Court
for the Western District of Missouri

Appendix G

The petition for rehearing en banc is denied. Judge McMillian would grant the petition.

The petition for rehearing by the panel is also denied. Judge Bright would grant rehearing before the panel on the prevailing party issue.

May 11, 1999

Order Entered at the Direction of the Court:

s/ [illegible]
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX H — MISSOURI HOUSE BILL NO. 1010, § 10.715, 89TH GENERAL ASSEMBLY

HOUSE BILL NO. 1010
89TH GENERAL ASSEMBLY
1998

* * *

There is appropriated out of the State Treasury, . . .

* * *

Section 10.715. To the Department of Health
For the Division of Maternal, Child and Family Health

1. For the purpose of funding family planning services, pregnancy testing and follow-up services, provided that none of these funds may be expended for the purpose of performing, assisting or encouraging for abortion, and further provided that none of these funds may be expended to directly or indirectly subsidize abortion services or administrative expenses, as verified by independent audit. None of these funds may be paid or granted to organizations or affiliates of organizations which provide or promote abortions. None of the funds may be expended for directly referring for abortion, however nondirective counseling relating to the pregnancy may be provided and nothing in this section requires an agency receiving federal funds pursuant to Title X of the Public Health Services Act to refrain from performing any service required pursuant to Title X, regulations adopted pursuant to Title X or the Title X Program Guidelines for Project Grants for Family Planning Services as published by the

U.S. Department of Health and Human Services in order to remain eligible to receive Title X funds, to be eligible to receive state funds pursuant to this section.

2. If any provision of subsection 1 of this section is in the future held invalid, then this appropriation shall be in accordance with subsection 3, otherwise subsection 3 and subsection 5 shall have no effect.

3. For the purpose of funding family planning services, pregnancy testing and follow-up services provided directly by the Department of Health or provided directly by government agencies including agencies of the United States, this state and any political subdivision of this state or directly by public health entities through contractual agreement with the department, provided that none of these funds may be expended for the purpose of encouraging for abortion. For the purposes of this subsection 3, public health entities shall include federally qualified health centers organized pursuant to 42 USC, section 1396d(l)(2)(B), rural health centers organized pursuant to 42 USC, section 1395x(aa)(2), community mental health centers organized pursuant to sections 205.975 to 205.990, RSMo, community action agencies organized pursuant to sections 660.370 to 660.374, RSMo, and migrant health centers organized pursuant to 42 USC, section 254b. None of the funds may be expended for directly referring for abortion, however nondirective counseling relating to the pregnancy may be provided and nothing in this section requires an agency receiving federal funds pursuant to Title X of the Public Health Services Act to refrain from performing any

service required pursuant to Title X, regulations adopted pursuant to Title X or the Title X Program Guidelines for Project Grants for Family Planning Services as published by the U.S. Department of Health and Human Services in order to remain eligible to receive Title X funds, to be eligible to receive state funds pursuant to this section.

4. If any provision of subsection 1 and also of subsection 3 of this section is in the future held invalid, then this appropriation shall be in accordance with subsection 5, otherwise subsection 3 and subsection 5 shall have no effect.

5. For the purpose of funding family planning services, pregnancy testing and follow-up services that are provided directly by the Department of Health or provided directly by government agencies (including agencies of the United States, this state or any political subdivision of this state) through contractual agreement with the department. Provided that none of these funds appropriated herein shall be expended for any act to refer for or assist an abortion, and no person while performing services in a project paid for by such funds shall perform any act to refer for or assist an abortion.

From General Revenue Fund	$5,018,639
From Federal Funds	1,464,819
Total (0 F.T.E.)	$6,483,459

* * * *

APPENDIX I — EXCERPTS FROM APPELLANT STATE OF MISSOURI'S MOTION FOR CLARIFICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2951

PLANNED PARENTHOOD OF MID-MISSOURI
and EASTERN KANSAS, INC.,

Plaintiff-Appellee,

v.

MAUREEN DEMPSEY, M.D., in her official capacity
as the Director of the Department of Health
of the State of Missouri, et al.,

Defendants-Appellees,

v.

STATE OF MISSOURI,

Intervenor Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Missouri
The Honorable Fernando J. Gaitan, Jr.
United States District Judge

APPELLANT STATE OF MISSOURI'S
MOTION FOR CLARIFICATION

Appendix I

Jordan B. Cherrick
Special Assistant Attorney General
Suzanne J. Gau
Thompson Coburn
One Mercantile Center
St. Louis, Missouri 63101

Attorneys for Appellant
State of Missouri

* * *

C. Relief Requested

The State respectfully requests that the Court clarify (either by amending its opinion or issuing a separate order, mandate, or instruction to the district court on remand) that:

(1) Planned Parenthood does not qualify for State family planning funds under § 10.715;

(2) Planned Parenthood must return to the State the family planning funds that it received under the district court's preliminary and permanent injunctions for fiscal year 1999;

(3) the sharing of the same or similar name between a § 10.715 grantee and its abortion providing affiliate gives an impermissible marketing benefit to the abortion providing affiliate that precludes the affiliate from being "independent";

(4) the term "facilities" as used by the Court includes physical space; and

(5) an organization that otherwise qualifies for family planning funds under § 10.715 may not distribute to patients abortion pamphlets or other abortion marketing materials.

Respectfully submitted,

THOMPSON COBURN

s/ Jordan B. Cherrick
Jordan B. Cherrick
Special Assistant Attorney General
Suzanne J. Gau
One Mercantile Center
St. Louis, Missouri 63101
(314) 552-6000
(314) 552-7000 Facsimile

Attorneys for Appellant
State of Missouri

APPENDIX J — SUPPLEMENT TO PLAINTIFF-APPELLEE'S PETITION FOR REHEARING AND REHEARING *EN BANC* ON THE ISSUE OF "PREVAILING PARTY," DATED APRIL 21, 1999 AND FILED APRIL 22, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 98-2951

PLANNED PARENTHOOD OF MID-MISSOURI
AND EASTERN KANSAS, INC.

Plaintiff-Appellee,

v.

MAUREEN DEMPSEY, M.D., et al.,

Defendant-Appellee,

and

JOHN DOE, 1 thru 99, employees
of the STATE OF MISSOURI,

Defendants-Appellees,

and

STATE OF MISSOURI,

Intervenor-Defendant-Appellant.

Appendix J

SUPPLEMENT TO PLAINTIFF-APPELLEE'S PETITION FOR REHEARING AND REHEARING *EN BANC* ON THE ISSUE OF "PREVAILING PARTY"

I. *Introduction.*

On April 7, 1999, Plaintiff-Appellee (Planned Parenthood) filed a Petition for Rehearing and Rehearing *En Banc* on the issue of prevailing party status. The Petition is currently pending. Planned Parenthood files this Supplement to that Petition to advise this Court of relevant developments that have occurred since the filing of that Petition.

II. *Supplemental Statement.*

In its Petition, Planned Parenthood stated that it "can and will comply with the separation requirements outlined in this Court's opinion, and will continue to participate in the program." Petition, pp. 8-9. See also, Petition p. 14 (same).

Following the filing of the Petition, Planned Parenthood received a letter, dated April 7, 1999, from the defendant Department of Health. That letter quoted an excerpt from this Court's opinion and set forth guidelines defining what would constitute compliance under the statute as interpreted in this Court's opinion. The letter enclosed a contract amendment, incorporating the Department's new guidelines. The letter advised that the amendment was to be signed and returned no later than April 30, 1999, or that Planned Parenthood's contract would be terminated.

Appendix J

On April 14, 1999, Planned Parenthood signed the contract amendment and returned it to the Department. Planned Parenthood stated in the amendment that it was in compliance with the new guidelines effective as of April 14, 1999.

Thus, Planned Parenthood in fact continues to participate in the program. As well, Planned Parenthood continues to offer abortion services through its separately incorporated affiliate, Comprehensive Health of Planned Parenthood, at its clinic located in Overland Park, Kansas.

Abortion services have, however, been temporarily suspended at the Planned Parenthood clinic in Columbia, Missouri. This temporary suspension is necessary in order to allow for physical alterations to be made to that clinic in order to comply with the Department's guideline defining "separate facility." Upon completion of those renovations, Comprehensive Health of Planned Parenthood will resume the provision of abortion services in Columbia.

These developments confirm that this litigation achieved the purpose for which it was filed: alteration of the legal relationship between the parties in a way that benefits Planned Parenthood. Before the litigation was filed and throughout the litigation, the Department and the State asserted that the statute disqualified any organization or affiliate of an organization providing abortions. As a result of the litigation, Planned Parenthood is eligible for the program, and continues to participate in the program, because it is in compliance with the constitutional interpretation of the statute set forth in this Court's opinion.

Appendix J

Respectfully Submitted,

ARTHUR BENSON &
ASSOCIATES

By: s/ Arthur Benson
Arthur A. Benson II #21107
Jamie Kathryn Lansford #31133
4006 Central (Zip for Courier: 64111)
P.O. Box 119007
Attorneys for Appellee Planned Parenthood Of Mid-Missouri and Eastern Kansas, Inc.

APPENDIX K — MISSOURI HOUSE BILL NO. 10, § 10.680, 88TH GENERAL ASSEMBLY

HOUSE BILL NO. 10
88TH GENERAL ASSEMBLY

Enacted
June 1, 1995

* * *

There is appropriated out of the State Treasury, . . .

* * *

Section 10.680. To the Department of Health

For the Division of Maternal, Child and Family Health Care

For the purpose of funding family planning services at private physicians' offices, public and private hospitals, public health agencies, federally-qualified health centers, community health centers, rural health clinics, community action agencies and the Department of Health's administrative agent for family planning by contract, which provides no patient care, for distribution to the above entities, and the Department of Health's administrative agent who contracts with not-for-profit corporations providing primarily mental health services with family planning offered only in conjunction with mental health services

From General Revenue Fund $1,333,137

From Federal Funds 1,464,819

Total (0 F.T.E.) $2,797,956

* * * *

APPENDIX L — MISSOURI HOUSE BILL NO. 1010 § 10.640, 88TH GENERAL ASSEMBLY

HOUSE BILL NO. 1010
88TH GENERAL ASSEMBLY
1996

Enacted
June 11, 1996

* * *

There is appropriated out of the State Treasury, . . .

* * *

Section 10.640. To the Department of Health . . .

For the purpose of funding family planning services at private physicians' offices, public and private hospitals, public health agencies, federally qualified health centers, community health centers, rural health clinics, community action agencies and the Department of Health's administrative agent for family planning by contract, which provides no patient care, for distribution to the above entities, and the Department of Health's administrative agent who contracts with not-for-profit corporations providing primarily mental health services with family planning offered only in conjunction with mental health services

From General Revenue Fund 1,800,000

Total (Not to exceed 15.25 F.T.E.) $16,814,994

* * * *

APPENDIX M — MISSOURI HOUSE BILL NO. 20 § 20.685, 89TH GENERAL ASSEMBLY

HOUSE BILL NO. 20
89TH GENERAL ASSEMBLY

Enacted
June 26, 1997

* * *

There is appropriated out of the State Treasury, . . .

* * *

Section 20.685. To the Department of Health

For the Division of Maternal, Child and Family Health

1. For the purpose of funding family planning services, pregnancy testing and follow-up services, provided that none of these funds may be expended for the purpose of performing, assisting or encouraging for abortion, and further provided that none of these funds may be expended to directly or indirectly subsidize abortion services or administrative expenses, as verified by independent audit. None of these funds may be paid or granted to organizations or affiliates of organizations which provide or promote abortions. None of the funds may be expended for directly referring for abortion, however nondirective counseling relating to the pregnancy may be provided and nothing in this section requires an agency receiving federal funds pursuant to Title X of the Public Health Services Act to refrain from performing any service required pursuant to Title X,

regulations adopted pursuant to Title X or the Title X Program Guidelines for Project Grants for Family Planning Services as published by the U.S. Department of Health and Human Services in order to remain eligible to receive Title X funds, to be eligible to receive state funds pursuant to this section.

2. If any provision of subsection 1 of this section is in the future held invalid, then this appropriation shall be in accordance with subsection 3, otherwise subsection 3 and subsection 5 shall have no effect.

3. For the purpose of funding family planning services, pregnancy testing and follow-up services provided directly by the department of health or provided directly by government agencies including agencies of the United States, this state and any political subdivision of this state or directly by public health entities through contractual agreement with the department, provided that none of these funds may be expended for the purpose of encouraging for abortion. For the purposes of this subsection 3, public health entities shall include federally qualified health centers organized pursuant to 42 USC, section 1396d(1), rural health centers organized pursuant to 42 USC, section 1395x(aa)(2), community mental health centers organized pursuant to sections 205.975 to 205.990, RSMo, community action agencies organized pursuant to sections 660.370 to 660.374, RSMo, and migrant health centers organized pursuant to 42 USC, section 254b. None of the funds may be expended for directly referring for abortion, however nondirective counseling relating to the pregnancy may be provided and nothing in this section requires an agency receiving federal funds pursuant to Title

X of the Public Health Services Act to refrain from performing any service required pursuant to Title X, regulations adopted pursuant to Title X or the Title X Program Guidelines for Project Grants for Family Planning Services as published by the U.S. Department of Health and Human Services in order to remain eligible to receive Title X funds, to be eligible to receive state funds pursuant to this section.

4. If any provision of both subsection 1 and also of subsection 3 of this section is in the future held invalid, then this appropriation shall be in accordance with subsection 5, otherwise subsection 3 and subsection 5 shall have no effect.

5. For the purpose of funding family planning services, pregnancy testing and follow-up services provided directly by the department of health or provided directly by government agencies including agencies of the United States, this state and any political subdivision of this state through contractual agreement with the department or provided at the site of a city or county health department by an agency under contract with the city or county health department, provided that none of these funds may be expended for the purpose of encouraging for abortion. None of the funds may be expended for directly referring for abortion, however nondirective counseling relating to the pregnancy may be provided and nothing in this section requires an agency receiving federal funds pursuant to Title X of the Public Health Services Act to refrain from performing any service required pursuant to Title X, regulations adopted pursuant to Title X or the Title X Program Guidelines for Project Grants for Family Planning Services as published by the U.S.

Appendix M

U.S. Department of Health and Human Services in order to remain eligible to receive Title X funds, to be eligible to receive state funds pursuant to this section.

From General Revenue Fund $5,018,639

From Federal Funds 1,464,819

Total $6,483,458

* * * *